tions, required in an appeal from the Orphans' Court, the Act of 1845, further requires, that in order to secure a stay or supersedeas of execution in equity, where the decree is for the payment of money, the appellant is required to give a bond to the adverse party, in at least double the amount of the sum decreed to be paid, with two sufficient sureties, to be approved by the Court; and it declares that such appeal being so perfected, shall *stay all further proceedings* in said Court, *upon the order or decree appealed from*, and upon the subject matter embraced in such order or decree. The evident intention of the act is, that if such appeal be perfected within the period allowed for the appeal, and before the decree is performed, the decree or order shall not be enforced. The process by which decrees are usually enforced in equity, whether attachment or sequestration, cannot be proceeded with after the appeal; the entire proceeding is arrested. The adoption by the Court of the writ of *fi. fa.* as final process to execute decrees for the payment of money cannot, of course, alter the effect which the law designed to give the perfected appeal, and where such writ has not been fully executed, before the appeal is perfected, the Court can do no act by which the decree may be enforced. In this case, the levy has been made upon the *fi. fa.*, and so returned by the Sheriff. At common law, such an execution is considered executed, and a writ of error is too late to arrest the sale of the goods levied on, but undoubtedly, such sale in this case would be a proceeding upon the decree appealed from. By authorizing the *vend. exp.*, the Court would be enforcing that decree, which by the plain terms of the Act of Assembly, they have not the power to do while the appeal is pending. The rule therefore, must be discharged.

In the New-York Supreme Court.

MATHEWS *vs.* MATHEWS.

An exception in a grant of lands in these words, "excepting and reserving out of the said piece of land so much as is necessary for the use of a grist mill on the east side of the road at the west end of the said mill-dam," is a good exception; but until the grantor or his assigns exercise the right reserved, and builds the mill, it is not operative, and ejectment cannot be sustained.

The plaintiff brought ejectment to recover the land described in the exception contained in the deed, hereinafter mentioned. The defendant pleaded title out of plaintiff and in himself.

On the trial it appeared in evidence, "that on the 2d day of February, 1809, John and Stephen Delematter (the then owners of the premises under a conveyance from William Cook, who derived his title directly from the soldier,) and their wives, by deed recorded 27th February, 1811, in consideration of $1000, conveyed to Stephen Wilcox fifty acres in the south-east corner of lot sixteen Manlius, and made a reservation in said deed as follows: "Excepting and reserving out of said piece of land so much as is necessary for the use of a grist-mill on the east side of the road at the west end of the saw-mill-dam," and that the plaintiff has, by a number of deeds, received a regular conveyance of the privilege and right of all the same, specified in said exception and reservation.

That the plaintiff in 1821 or 1822, erected a grist-mill adjoining the premises (but not on lot 16 Manlius, the reserved premises,) and has occupied the same up to the time of the commencement of this suit, and the dam which was built in 1803 or 1804, that raises the water for the use of the grist-mill, is partly on the land embraced in said exception, and the water so raised flows some portion thereof, and the plaintiff has entered on and upon said land embraced in said exception from time to time for the last twenty-five years, for the purpose of repairing his dam, and the greater portion of the premises so excepted are necessary for the use of the grist-mill of the plaintiff adjoining the premises contained in said exceptions for the purpose of having the dam as a part thereof, thereon, and to be flowed with water and to procure earth and material to repair the dam as well as to enter upon the same for that purpose. The centre of Chittenango Creek is the east line of lot sixteen Manlius.

The plaintiff had judgment, and on a case agreed a motion was made for a new trial.

H. Burdeck, for Plaintiff.

Le Roy Morgan, for Defendant.

The opinion of the Court was delivered by

PRATT, J.—The principal question involved in this case has been

settled by an adjudication in this Court in the case of *Dygert* vs. *Mathews*, 11 Wend. 35. That was an action of trespass brought in 1830, in the Onondaga Common Pleas by Dygert, who was then in possession of the premises now in dispute against Mathews the present plaintiff, for taking gravel therefrom to repair the mill-dam. Mathews attempted to justify under the same title upon which he claims to recover in the present action. Upon the trial in that case it was ruled that the premises in question did not pass by the deed from Delematter to Wilcox, and that it was not necessary for Mathews in order to avail himself of the exception in that deed, to build his grist-mill upon the premises excepted. The defendant obtained a verdict upon which judgment was entered, and the cause was carried to the Supreme Court upon writ of error, where the judgment of the Common Pleas was reversed. The Supreme Court held that the exception in the deed to Wilcox was not intended to except from the operation of the grant the absolute fee of the land, but, that it was designed to reserve simply a mill site or privilege; that until the right reserved should be exercised by the grantor or his assigns by building the mill upon the same premises, the reservation would be inoperative and the whole premises would vest in the grantee and his assigns. The decision in that case covers the whole ground and is well sustained by the cases of *Thompson* vs. *Gregory*, 4 J. R. 81, and *Provost* vs. *Calder*, 2 Wend. 517, cited by the learned judge who gave the opinion of the Court. It is true the language of his opinion would seem to lay down a proposition which cannot be sustained in the broad terms in which it is enunciated. He says "those cases" (alluding to the cases above cited) "recognize the doctrine that strictly an exception of a part of the thing granted is void, but an incident to the grant may be reserved." I find no such doctrine advanced in those cases, but directly the reverse is the rule laid down in the books. An exception to be good "must be a part of the thing granted and not of some other thing," Shep. Touchstone, 78; Co. upon Litt. 47; and 1 Atkinson on Con. 322; 2 Prest. on Con. 462. It is true, the exception must not be repugnant to the grant, and therefore it must be of a particular thing out of a general, and not of a particular thing out of a

particular thing. For instance, if one grant White-acre and Black-acre, excepting White-acre, the exception would be void, for White-acre being mentioned by name in the grant, the exception of the same thing granted would be repugnant and therefore void. So if one grant twenty acres of land excepting one acre, the exception is void, but if the grant is, of all that close containing twenty acres, excepting one acre, the exception would be good, for in this instance, it is the close, and not the particular twenty acres, which is granted. Shep. Touchstone, 78. So far therefore as the exception in this case was of a part of the thing granted, it might be good, provided the design of the parties had been to except from the operation of the grant the premises in question, and the premises had been described with sufficient certainty.

And this leads us to the consideration of another rule in regard to exceptions in a grant which bears more directly upon the conveyance in question in this case. The description of the thing excepted must be as certain as if it were granted. Prest. on Con. 462; 1 Atkinson on Con. 382. "If one grant a house excepting one chamber, or grant a manor, excepting one acre, but doth not set forth which chamber, or which acre, it shall be these exceptions are void for uncertainty." Shep. Touchstone, 79. Under this rule it is manifest that as an attempt to reserve out of the operation of the grant, the fee of the land, the exception in the deed to Wilcox would be void for uncertainty. It would be entirely uncertain until the mill should be built, and the land appropriated, how much land would be necessary or where located.

It was for the same reason that the Court in the case of *Thompson* vs. *Gregory*, held the exception in that case void as an exception of the land itself. They held it void for uncertainty and not because the exception was of part of the thing granted as the learned judge seemed to assume in the case of *Dygert* vs. *Mathews*.

But as the reservation of a mill privilege, which is a mere incident to the grant, the exception is good. As it would be inoperative until the right should be exercised, no such certainty is requisite. The title of the property would pass to the grantee, subject to the reserved right, and he would be invested with the absolute

control of the premises except as against the grantor or his assigns in the actual exercise of the right reserved.

But if the exception should be held good as a reservation of the land itself, it was an exception only of so much as was necessary for the purposes of the mill. It would therefore necessarily raise a question of fact requiring proof. No proof upon this question was adduced, and it is difficult to perceive how the referee could assume that the premises described in the plaintiff's complaint were the precise quantity of land necessary for the purpose of a mill. The language of the exception is as follows, "Reserving out of said piece of land so much as is necessary for the use of a grist-mill, on the east side of the road at the west end of the saw mill-dam."

The land necessary is the measure of quantity, and this could only be ascertained by proof.

Again, if it was important that the defendant should show title in himself, the deed from Brooks to him was clearly competent for that purpose under the pleadings. It was perhaps sufficient for the defendant to show title out of the plaintiff, but the particular objection taken to its admission was clearly untenable.

The judgment must therefore be reversed, and a new trial granted.

ABSTRACTS OF RECENT ENGLISH DECISIONS.

Arbitration—Joint Execution.—Where an award is to be made by more than one arbitrator, it must be the joint act of all, executed in the presence of each other; therefore an award in such case which purports to be signed and published by the arbitrators at different places is invalid. *Wade* vs. *Dowling*, 18 Jur. 728, Q. B.

Assignment, Voluntary—Incomplete Alienation.—In order to make a voluntary assignment of a reversionary interest, of a chose in action, or the like, effectual against the assignor, he must at the time of the assignment, have done all in his power to make it available. *Beech* vs. *Kemp*, 23 L. J. Ch., 539, Rolls.

But a reversionary interest standing in the name of a trustee may be transferred by voluntary deed with notice to the trustee, if the assignor